(1)

RECEIVED
HAND DELIVERED
MAY 13 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 84 6792

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

Patrick Wayne Kerr, Petitioner
v.

Fred Finkbeiner, Warden

and

Gerald L. Baliles, Attorney General for Virginia

RECEIVED
HAND DELIVERED
MAY 29 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert C. Whitestone
10511 Judicial Drive, Suite 200
Fairfax, Virginia 22030
(703) 591-0200
Counsel for Patrick Wayne Kerr

Todd E. LaPage, Assistant
Commonwealth's Attorney
101 North 8th Street
Richmond, Virginia 22319
(804) 786-6565
Counsel for Fred Finkbeiner

Gerald L. Baliles, Attorney
General of Virginia
101 North 8th Street
Richmond, Virginia 22319
(804) 786-2071

4816

4CCA 28
(Rev. 7/82)

United States Court of Appeals
FOR THE FOURTH CIRCUIT

RECEIVED
MAR 1 9 1985

March 18, 1985

TO: Robert C. Whitestone, Esq.
A. Strode Brent, Jr., Esq.
Todd E. LePage, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 84-6367 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time A petition may be filed within 14 days after judgment. *No extension will be granted save for most compelling reasons*. Requests based on grounds such as miscalculation of time or a need consult with others will be peremptorily denied.

Purpose A petition should only be made to direct the Court's attention to one or more of the followi situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlook by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinior

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel *A petition shall contain an introduction stating that, in counsel's judgment, one or more of th situations exist as described in the above "Purpose Section". The points to be raised shall b succinctly listed in the statement. Lacking such a statement, the petition will be returned t counsel without filing.*

Form The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of t petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs with 14 days after judgment.

Mandate (FRAP 41)

Issuance Time The mandate is issued 21 days after judgment. A timely petition for rehearing will stay t issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate sought, only the original of a motion need be filed.

Stay A motion for stay of the issuance of the mandate shall not be granted simply upon reques Ordinarily the motion will be denied unless it would not be frivolous or filed merely for del and would present a substantial question or otherwise set forth good or probable cause for a stay

JOHN M. GREACEN
CLERK

Enclosure

QUESTION PRESENTED

Whether the violation of the 180 day time limitation of Article III(a) of the Interstate Agreement on Detainers constitutes a fundamental defect entitling a petitioner to habeas corpus relief under 22 U.S.C. Section 2254 (1976).

TABLE OF CONTENTS

I.	TABLE OF CITATIONS	ii
II.	OPINION BELOW	1
III.	JURISDICTION.	1
IV.	QUESTION PRESENTED.	2
V.	STATUTORY PROVISIONS INVOLVED	2
VI.	STATEMENT OF THE CASE	2
VII.	REASONS FOR GRANTING THE WRIT	4
VIII.	CONCLUSION.	10
IX.	CERTIFICATE OF SERVICE.	11
X.	APPENDIX.	12

TABLE OF CITATIONS

18 U.S.C. App. Section 2, Art. III(a) (1982) 2, 3

28 U.S.C. Section 2254. . . . . 4, 5

Bush v. Muncy, 659 F.2d 402 (4th Cir. 1981)
cert. denied, 455 U.S. 910 (1982). 4, 6

Cody v. Morris, 623 F.2d 101, 102-03
(9th Cir. 1980). 5

Davis v. United States, 417 U.S. 333, 346
(1974) [quoting Hill v. United States,
368 U.S. 424, 428 (1962)]. 4

Diamond Match Company v. United States, 181 F. Supp.
952, 959 (Customs Court, 3rd Div. 1960). 10

Morris v. United States, 615 F.2d 704,
(6th Cir. 1980). 6

Stroebel v. Anderson, 587 F.2d 830, 840
(6th Cir. 1978). 6

U. S. v. Ford, 436 U.S. 340 (1978). 9

United States v. Mauro, 436 U.S. 340, 360
(1978) 6, 9

United States v. Williams, 615 F.2d 585
(3rd Cir. 1980). 4, 5

Williams v. State of Maryland, 445 F. Supp 1216
(1978) 7, 8

NO._____

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

Patrick Wayne Kerr, Petitioner
v.

Fred Finkbeiner, Warden

and

Gerald L. Baliles, Attorney General for Virginia

PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner, Patrick Wayne Kerr, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Fourth Circuit entered in this proceeding on March 18, 1985.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. A memorandum opinion was rendered by the District Court for the Eastern District of Virginia on May 2, 1984, and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth

Circuit was entered on March 18, 1985, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rule 20.

QUESTION PRESENTED

Whether the violation of the 180 day time limitation of Article III(a) of the Interstate Agreement on Detainers constitutes a fundamental defect entitling a petitioner to habeas corpus relief under 22 U.S.C. Section 2254 (1976).

STATUTORY PROVISIONS INVOLVED

18 U.S. C. App. Section 2, Art. III(a) (1982), Interstate Agreement on Detainers.

STATEMENT OF THE CASE

The facts of this case are undisputed. While incarcerated in Chowan County, North Carolina, Petitioner was served with fugitive warrants from Spotslyvania County, Virginia, alleging certain felonies committed in that county. On May 17, 1979, Petitioner transmitted his "Motion and Request for a Speedy Trial upon Pending Charge or for Dismissal of Detainer", to the Spotsylvania Circuit Court pursuant to the procedure outlined in the I.A.D.A. Article III (a). The receipt of this request was

acknowledged by the appropriate authorities in Spotsylvania County on May 23, 1979. Petitioner was eventually returned to Virginia from North Carolina on September 25, 1979, and a preliminary hearing was scheduled for November 7, 1979. Upon request of Petitioner's attorney, the preliminary hearing was rescheduled for November 28, 1979. On that date the Petitioner formally waived his right to a preliminary hearing, and his case was referred to the Grand Jury of Spotsylvania County. Petitioner was subsequently indicted on January 2[illegible], 1980, and his case set for trial on May 22, 1980. It is important to note that Petitioner's rescheduling of the preliminary hearing date did not, in any way, delay the Virginia authorities in bringing Petitioner to trial, since the preliminary hearing was held within the same term (October) of the Spotsylvania County Circuit Court, and there was no possibility of an earlier indictment by the Grand Jury.

On May 19, 1980, Petitioner moved to dismiss the indictment against him on the ground that he had not been tried within the 180 day time limit as set forth in the I.A.D., Article III. This motion was denied, and on May 22, 1980, (fully one year after filing his request for a speedy trial), he was convicted of robbery, breaking and entering, use of a firearm in the commission of a felony, and petit larceny. A subsequent Petition for Writ of Error

to the Virginia Supreme Court, filed July 17, 1980, was denied on December 8, 1980. Petitioner then applied for a Writ of Habeas Corpus under 28 U.S.C. 2254 in the U.S. District Court for the Eastern District of Virginia, Alexandria Division which was dismissed on May 2, 1984. In denying Petitioner's request, the District Court, relying on the analysis in Bush v. Muncy, 659 F.2d 402 (4th Cir. 1981), cert. denied, 455 U.S. 910 (1982), concluded that violations of the time limitations set out in the Interstate Agreement on Detainers (hereafter referred to as I.A.D.) do not amount to fundamental defects entitling a petitioner to habeas relief under 28 U.S.C. 2254. The Fourth Circuit Court of Appeals affirmed on March 18, 1985.

REASONS FOR GRANTING THE WRIT

Petitioner first argues that the failure of the Virginia authorities to bring him to trial within the 180 day limitation imposed by Article III (a) of the I.A.D., amounts to "a fundamental defect which inherently results in a complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974), [quoting Hill v. United States, 368 U.S. 424, 428 (1962)]. As correctly noted in Bush, supra, there is a split of authority on the question presented in this case. In United States v. Williams, 615

F.2d 585 (3rd Cir. 1980), the court directly confronted the question of whether an alleged violation of the time limitations of the I.A.D. constituted a fundamental defect that would entitle the prisoner to habeas relief. Speaking for the Court, Judge Rosenn wrote, "[a]lthough an IADA violation may have little if no bearing on the prisoner's guilt or innocence, nonetheless Congress chose to make the defense absolute when the Government violates the Act ..." at page 590. He went on to conclude, " ... we fail to see how an alleged IADA violation would not be the type of 'fundamental defect' cognizable in section 2255 proceedings."

The Ninth Circuit, in reliance of the Third Circuit's discussion in Williams, supra has also held that a violation of the I.A.D. should be considerd in a Section 2254 action. See, Cody v. Morris, 623 F.2d 101, 102-03 (9th Cir. 1980). The court also indicated that, given the correct factual background, this equest for relief could be granted.

As noted, the Fourth Circuit, in the case before the Court, has held that violation of the I.A.D. does not constitute a fundamental defect entitling a petitioner to habeas corpus relief under 28 U.S.C. Section 2254.

The Sixth Circuit, on the other hand, has ruled that a violation of the I.A.D. was not cognizable in a Section 2255

proceeding. Morris v. United States, 615 F.2d 704, (6th Cir. 1980). However, it should be noted that in Morris, the majority was strongly opposed by a dissent written by Chief Judge Edwards who argued that an affirmative decision on the cognizability issue was implicit in a prior ruling by that Circuit in Stroebel v. Anderson, 587 F.2d 830, 840 (6th Cir. 1978). It should further be noted that in those Circuits which have ruled that failure to try within the mandatory time limits imposed by the I.A.D. is not a fundamental defect, the courts have done so in reliance on the concept that only a breach of a constitutional guarantee may constitute fundamental error. As the Bush court stated, " ... though these [fundamental defects] may include other rights than those directly related to the establishment of guilt or innocence, we do not think they extend to nontraditional statutory guarantees, no matter how worthy of purpose ... ." The concept of fundamental fairness must extend beyond those rights directly related to the establishment of guilt or innocence. The legislative history of the I.A.D. indicates that Congress intended just that. A comprehensive survey of the subject by the Supreme Court in United States v. Mauro, 436 U.S. 340, 360 (1978) prompted that court to write:

> The adverse effects of detainers that

> prompted the drafting and enactment of the Agreement are thus, for the most part, the consequence of the lengthy duration of detainers. Because a detainer remains lodged against a prisoner without any action being taken on it, he is denied certain privileges within the prison, and rehabilitation efforts may be frustrated. For these reasons, the stated purpose of the Agreement is to 'encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints.'" Article I.

In doing so, the Supreme Court has acknowledged the precise injustice which Congress intended to remedy by enactment of the I.A.D. In fact, the legislation itself indentified not only the fundamental right of the accused to trial within a reasonable time, but also the prejudice suffered by the defendant if that right was not acknowledged and enforced. The legislature, by providing the penalty of dismissal with prejudice for not bringing the defendant to trial within 180 days has clearly and definitively stated their attitude concerning detainer actions.

Petitioner further argues that it would be fundamentally unfair for the State to require the Petitioner to fully comply with all procedures outlined in the I.A.D. regarding the triggering of these safeguards without requiring the State to honor its obligations. In Williams v. State of Maryland, 445 F. Supp. 1216 (1978), the Court noted that "[a] mere lapse in time between the

institution of criminal proceedings and trial, certainly so long as it is not of constitutional magnitude, does not implicate fundamental rights of a criminal defendant." This case was also relied upon by the District Court in the instant case. However, it is interesting to note that that same court also stated that "[a] prisoner seeking to benefit from the statutory provisions must first meet the burden of compliance with the Act. Petitioner having failed to satisfy the notice prerequisites of the Act despite advice that he must do so, may not now complain that he was denied benefits." The Williams, supra, case was decided on entirely different grounds than either a statutory right to speedy trial or the procedural defect outlined above. In fact, the court ruled that the Petitioner's guilty plea barred the attack upon what they characterised as " ... at most a procedural defect in bringing him to trial."

Your Petitioner comes before this Court with "procedurally clean hands". This fact alone distinguishes this case from almost every other case heretofore tried on the issue. To accept the dicta of Williams, supra, as well as that of cases decided in other Circuits, would be to accept a situation in which procedural defects are fatal to the defendant, while the State or federal government

may proceed without regard to explicit legislative direction. Certainly this was not the intent engendered by the framers of the Constitution or the lawmakers who enacted the I.A.D., to protect the rights of individuals in the custody of state and federal authorities.

In U.S. v. Ford, 436 U.S. 340 (1978), a companion case to Mauro, supra, the Supreme Court concluded that, if Article IV (c) of the Act was applicable, it was violated by the extensive delay in bringing Ford to trial, and accordingly concluded that the Court of Appeals correctly reversed the judgment of the District Court and ordered that the indictment against Ford be dismissed. In Ford, the respondent having been arrested on October 11, 1973, and subsequently filing his request for a speedy trial was, nonetheless, not tried on the indictments until September 2, 1975. Ford also had moved for a dismissal of the indictment on speedy trial grounds, and was denied such relief. The applicabiilty of this decision by the Supreme Court to the instant case is unmistakable. In the Ford, supra, case the Supreme Court, in regard to the mandatory nature of the speedy trial provision of the I.A.D., stated that, " any other reading of this section would allow the government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action."

It is well settled that statutes which provide a time for the performance of an official duty will ordinarily be held directory when there are no negative words restraining the doing of the act after the time specified, and no penalty is imposed for delay. Diamond Match Company v. United States, 181 F. Supp. 952, 959 (Customs Court, 3rd Div. 1960). However, the provisions of the I.A.D. are, under this analysis mandatory, requiring dismissal if the time limitations are violated.

CONCLUSION

It is, perhaps, too easy to overlook the fact that a defendant held on a detainer may be denied his freedom for a substantial period of time. I.A.D. actions put a "hold" not only on the normal correctional process, but also may affect the parole process and availabiilty of work programs. In this regard, the prisoner's "freedoms" may be drastically affected and there is no recourse through traditional devices such as bond reduction hearings.

When viewed in this light, and considered in context with the clear legislative intent, it is clear that a violation of the time limits specified in the I.A.D. constitutes a fundamental defect.

For these reasons a writ of certiorari should issue to

review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

Robert C. Whitestone
10511 Judicial Drive, Suite 200
Fairfax, Virginia 22030
(703) 5910200
Counsel for Petitioner, Patrick
Wayne Kerr

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of May, 1985, filed the required copies of the Petition for Writ of Certiorari in the Clerk's Office, and have mailed the required copies of same to Todd E. LePage, Assistant Attorney General, Criminal Law Enforcement Division, 101 North 8th Street, Richmond, Virginia 23219.

Robert C. Whitestone

APPENDIX

TABLE OF CONTENTS

Interstate Agreement on Detainers 13

United States District Court
For the Eastern District of Virginia
Alexandria Division
Kerr v. Finkbeiner, Civil Action No. 83-1324-AM
Memorandum Opinion and Order 27

United States Court of Appeals
For the Fourth Circuit
Kerr v. Finkbeiner, No. 84-6367 33

Act Dec. 9, 1970, P. L. 91-538, Sections 1-8, 84 Stat. 1397, provided:

Sec. 1. This Act may be cited as the "Interstate Agreement on Detainers Act".

Sec. 2. The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this Agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction,

cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) `State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) `Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) `Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred

and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other

official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court

shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitedd
by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which

an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: And provided further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said

authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force

or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment,

information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons

awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of the agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting,

caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"Article VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tilled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"Article VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to

carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to effective operation of this agreement.

"Article VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"Article IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party

hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

Sec. 3. The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Commissioner of the District of Columbia.

Sec. 4. The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

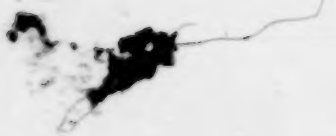
Sec. 5. All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

Sec. 6. For the United States, the Attorney General, and for the District of Columbia, the Commissioner of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform

such other acts as he deems necessary for carrying out the provisions of this Act.

Sec. 7. The right to alter, amend, or repeal this Act is expressly reserved.

Sec. 8. This Act shall take effect on the ninetieth day after the date of its enactment [enacted Dec. 9, 1970].



IN THE U TED STATES DISTRICT COU FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICK WAYNE KERR, Petitioner,	)	
V.	)	CIVIL ACTION NO. 83-1324-AM
FRED FINKBEINER, Warden, et al., Respondents.	)	

MEMORANDUM OPINION

I.

Petitioner, Patrick Wayne Kerr, has filed an application for habeas relief pursuant to 28 U.S.C. § 2254 alleging that he was not tried in accordance with the time provisions specified by the Interstate Agreement on Detainers (IAD). Respondents have answered with a motion to dismiss the application and petitioner has had the opportunity to respond to such motion. The case is now ready for consideration.

During April, 1979, fugitive warrants were issued against petitioner by the Circuit Court of Spotsylvania County, Virginia. These warrants were served on petitioner while he was incarcerated at an institution in Chowan County, North Carolina. On May 17, 1979, petitioner transmitted a "Motion and Request for a Speedy Trial Upon Pending Charge or for Dismissal of Detainer" to the Spotsylvania Circuit Court. Subsequently, on May 23, 1979, appropriate authorities in Spotsylvania County acknowledged receipt of petitioner's motion.

On September 25, 1979, petitioner was returned to Virginia from North Carolina to stand trial. A preliminary hearing in his case was set for November 7, 1979, but upon request by petitioner's attorney, the hearing was rescheduled for November 28, 1979. However, on November 28, 1979, petitioner formally waived his right to a preliminary hearing. He was then indicted by a grand jury on January 21, 1980.

On May 19, 1980, petitioner moved to dismiss the indictment against him on the ground that he had not been tried within the time limits set forth in the IAD. His motion was denied and on May 22, 1980, he was convicted of robbery, breaking and entering, use of a firearm in the commission of a felony, and petit larceny. A subsequent petition for a writ of error to the Virginia Supreme Court, filed July 17, 1980, was denied on December 8, 1980.

II.

Petitioner, in support of his request for habeas relief, relies on article III(a) of the IAD, Va. Code § 53.1-210. Such section provides in pertinent part as follows:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown

> in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance....

Petitioner contends that, in bringing him to trial, Virginia authorities clearly exceeded the 180 day time period mandated by article III(a) noted above. In fact, he adds, his trial took place precisely one year after his "Motion and Request for a Speedy Trial Upon Pending Charge or for Dismissal of Detainer" was acknowledged by the Spotsylvania Circuit Court. He claims that this failure on Virginia's part to try him within the required time limits specified in the IAD should have resulted in the dismissal of the indictment against him and is now a compelling reason to grant him habeas relief.

Respondents, however, raise two points in support of their motion to dismiss. First, they argue that habeas relief is unavailable to petitioner because claimed violations of the IAD are not cognizable in federal courts under 28 U.S.C. § 2254. Second, they claim that, even if this court can grant petitioner relief under federal habeas provisions for violations of the IAD's time limits, petitioner, through his actions, has waived his right to raise such an issue.

III.

In Bush v. Muncy, 659 F.2d 402 (4th Cir. 1981), cert. denied, 455 U.S. 910 (1982), the Fourth Circuit Court of Appeals discussed the relationship between violations of the IAD and federal habeas relief under 28 U.S.C. § 2254. There, petitioner

had claimed that the trial-before-return provision of the IAD had been violated by Maryland authorities and thus the charges against him should have been dismissed. The court, in affirming the denial of habeas relief by the district court, analyzed the case on two levels. First, the court conceded that the IAD, through the Compact Clause of the United States' Constitution, was a "law ... of the United States" within the meaning of 28 U.S.C. § 2254. Yet, the court went on to note that:

> [N]ot all violations of the "laws of the United States" may be asserted in a habeas corpus proceeding. [T]he appropriate inquiry [is] whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t ... present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" Davis v. United States, 417 U.S. 333, 346 (1974) [quoting Hill v. United States, 368 U.S. 424, 428 (1962)].

Bush, supra at 407. The court concluded, after surveying holdings of the various circuits, that, while the trial-before-return provision, as part of the IAD, was federal law and thus subject to enforcement in applicable state criminal proceedings, it did not involve a fundamental defect subject to collateral review under 28 U.S.C. § 2254.

While the court in Bush refused to allow a violation of the IAD's trial-before-return provision to be cognizable in a federal habeas action, it specifically stated that:

> [W]e do not address the question whether a violation of the time limits for prosecution provided by art. III(a) and IV(c) of the IAD might be cognizable under § 2254, noting only that these involve different interests of the criminal accused than do the trial-before-return provisions....

Bush, supra at 408, n. 4. Respondents, however, now ask this court to extend the holding in Bush to cover violations of the IAD's time provisions, i.e., that such violations do not amount to fundamental defects entitling petitioner to habeas relief under 28 U.S.C. § 2254. The court is in agreement with respondents' position. As was aptly stated in Williams v. State of Maryland, 445 F. Supp. 1216, 1222 (D. Md. 1978), "[a] mere lapse in time between the institution of criminal proceedings and trial, certainly so long as it is not of constitutional magnitude, does not implicate fundamental rights of a criminal defendant." Since petitioner has alleged no prejudice from any delay here that raise his allegations to constitutional magnitude, see Barker v. Wingo, 407 U.S. 514 (1972), the court finds that petitioner's claim does not state a fundamental defect cognizable under 28 U.S.C. § 2254. Consequently, the court need not address the issue of waiver presented by the respondents.

/s/ C.F.V. 6.1.

United States District Judge

Alexandria, Virginia
May 2nd, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICK WAYNE KERR, Petitioner,	)	
V.	)	CIVIL ACTION NO. 83-1324-AM
FRED FINKBEINER, Warden, et al., Respondents.	)	

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is hereby

ORDERED that the motion of the respondents to dismiss is granted; and this action is dismissed.

Should the petitioner wish to appeal, written notice of appeal must be filed with the clerk of this court within thirty (30) days of the date of this order.

United States District Judge

Alexandria, Virginia
May 2nd, 1984

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-6367

Patrick Wayne Kerr,

Appellant,

versus

Fred Finkbeiner, Warden;
Gerald Baliles, Attorney
General of Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 83-1324-AM)

Argued: January 7, 1985 Decided: March 18, 1985

Before HALL, ERVIN and SNEEDEN, Circuit Judges.

A. Strode Brent, Jr. (Robert C. Whitestone; Whitestone, Rodway, Phillips, Brent, Young & Merril, P.C. on brief) for Appellant; Todd E. LePage, Assistant Attorney General (Gerald L. Baliles, Attorney General on brief) for Appellees.

HALL, Circuit Judge:

Patrick Wayne Kerr appeals from the district court's order dismissing his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. We affirm.

I.

In April, 1979, fugitive warrants were issued in Chowan County, North Carolina, against Kerr, who was then incarcerated in Chowan County. The warrants charged Kerr with robbery, breaking and entering, use of a firearm in the commission of a felony, and petit larceny, all of which occurred in Spotsylvania County, Virginia, on January 17, 1979. Kerr transmitted a "Motion and Request for a Speedy Trial Upon Pending Charge or for Dismissal" of the charges contained in the fugitive warrants to the Spotsylvania County Circuit Court. The motion was filed on May 21, 1979.

Kerr was transported to Virginia from North Carolina on September 25, 1979. A preliminary hearing was set for November 7, 1979, but, upon request of Kerr's attorney, the hearing was rescheduled for November 28, 1979. On that date, Kerr formally waived his right to a preliminary hearing and consented to the proceedings being by direct indictment by a grand jury. On January 21, 1980, he was indicted by a grand jury for robbery, breaking and entering, use of a firearm in the commission of a felony, and petit larceny.

On May 19, 1980, Kerr moved to dismiss the indictment against him, claiming that he had not been tried within 180 days of his May 21, 1979, motion pursuant to the provisions of Article III(a) of the Interstate Agreement on Detainers Act (the "IADA").[1/] Kerr's motion to dismiss the indictment was denied, and on May 22, 1980, upon trial to the court, he was found guilty as charged. Kerr was sentenced to serve a total of twenty-nine years in the Virginia State Penitentiary, sixteen years of which were to run concurrently with other sentences previously imposed upon him. His subsequent petition for a writ of error to the Supreme Court of Virginia was denied.

[1/] Article III(a) of the IADA provides, in pertinent part, as follows:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

18 U.S.C. App. § 2, art. III(a) (1982).

On May 19, 1980, Kerr moved to dismiss the indictment against him, claiming that he had not been tried within 180 days of his May 21, 1979, motion pursuant to the provisions of Article III(a) of the Interstate Agreement on Detainers Act (the "IADA").[1/] Kerr's motion to dismiss the indictment was denied, and on May 22, 1980, upon trial to the court, he was found guilty as charged. Kerr was sentenced to serve a total of twenty-nine years in the Virginia State Penitentiary, sixteen years of which were to run concurrently with other sentences previously imposed upon him. His subsequent petition for a writ of error to the Supreme Court of Virginia was denied.

[1/] Article III(a) of the IADA provides, in pertinent part, as follows:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

18 U.S.C. App. § 2, art. III(a) (1982).

Kerr then petitioned the federal district court for habeas corpus relief, alleging that he was not tried within the 180-day time limit prescribed by the IADA. Respondents moved to dismiss Kerr's petition on the ground that, inter alia, it did not state a cognizable claim under 28 U.S.C. § 2254. The district court agreed and granted respondents' motion to dismiss. From this dismissal, Kerr appeals.

II.

On appeal, Kerr contends that his claim that he was not tried within the time limits set forth in the IADA was cognizable under 28 U.S.C. § 2254. We disagree.[2/]

[2/]At the outset we note that the parties to this action have assumed that the fugitive warrants issued against Kerr while he was incarcerated in Chowan County, North Carolina, served as a detainer within the meaning of the IADA. Although the IADA does not define the word "detainer," the legislative history of the IADA states that "[a] detainer is a notification filed with the institution in which a prisoner is serving a sentence advising that he is wanted to face pending criminal charges in another jurisdiction." H.R. Rep. No. 91-1018, S. Rep. No. 91-1356, 91st Cong., 2d Sess. 3, reprinted in 1970 U.S. Code Cong. & Ad. News 4864, 4865 (emphasis added).

The record in this case is not clear with respect to whom the fugitive warrants were delivered and how Kerr received notice of the warrants. A review of the warrants shows that they were issued in Chowan County, North Carolina, by the Clerk of Superior Court of that County on the basis of arrest warrants received from Spotsylvania County, Virginia. The fugitive warrants were addressed "TO THE SHERIFF OF CHOWAN COUNTY OR OTHER LAWFUL OFFICER OF NORTH CARCLINA." They listed the felonies for which Kerr was wanted in Spotsylvania County and commanded the recipient(s) "to arrest the said PATRICK W. KERR, and keep him safely in order that he may be dealt with as law directs, UNTIL SAID DEFENDANT IS TURNED OVER TO The Commonwealth of Virginia."

(footnote, cont'd)

In Davis v. United States, 417 U.S. 333 (1974), the Supreme Court held that the appropriate inquiry to determine if habeas relief is warranted is "whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" Id. at 346 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).[3/] In Bush v. Muncy, we considered whether an alleged violation of Article IV(e) of the IADA, which requires that a prisoner be tried on all pending charges on which detainers have been lodged before being returned to his original place of incarceration, was grounds for habeas corpus relief. Applying the Davis criteria, we concluded that such a violation did "not constitute a fundamental defect entitling a petitioner to habeas relief under section 2254." Bush, 659 F.2d at 408. However, we specifically refrained from deciding whether an alleged violation of Article III(a)'s 180-day time provision presents a cognizable claim. Id. at 408 n.4.

A review of the other circuits which have ruled on the

The question of whether the fugitive warrants issued against Kerr served as a detainer has not been raised in this case. Therefore, we do not address the issue, but merely assume, for the purposes of this opinion only, that they did function as a detainer.

[3/] As we stated in Bush v. Muncy, 659 F.2d 402 (4th Cir. 1981), although the Supreme Court's decision in Davis was based on a claimed violation of the IADA in the context of 28 U.S.C. § 2255 instead of § 2254, "we can perceive no difference in the statutory language of the two sections that would merit different treatment of the IAD[A]." Id. at 407 n.3.

cognizability of federal habeas corpus claims based on alleged violations of the IADA indicates that the courts are divided. Although the Third and Ninth Circuits have held that such claims are cognizable under the provisions for federal habeas relief,[4/] we agree with the decisions of the First, Second, Sixth, Eighth and Tenth Circuits, which have concluded that IADA claims do not constitute fundamental defects and are not generally cognizable under federal habeas corpus provisions absent a showing of prejudice.[5/]

Specifically, we hold that the violation of the 180-day time provision of Article III(a) alleged in this case does not

---

[4/]The Third Circuit has held that an alleged violation of the IADA is cognizable under § 2255, finding that such a violation is an exceptional circumstance warranting habeas relief. United States v. Williams, 615 F.2d 585, 590 (3rd Cir. 1980). The Ninth Circuit has also ruled that a claim under the IADA is cognizable in federal habeas corpus. Cody v. Morris, 623 F.2d 101, 102-03 (9th Cir. 1980).

[5/]The Tenth Circuit has held that "[a]bsent special circumstances, violations of the IADA are not grounds for collateral attack on a federal conviction and sentence under § 2255." Greathouse v. United States, 655 F.2d 1032, 1034 (10th Cir. 1981), cert. denied, 455 U.S. 926 (1982). See also Mars v. United States, 615 F.2d 704 (6th Cir.), cert. denied, 449 U.S. 849 (1980) (alleged violations of Article IV(e) trial-before-return provision and Article IV(c) 120-day time limit not cognizable under § 2255 as petitioner failed to show actual prejudice); Fasano v. Hall, 615 F.2d 555 (1st Cir.), cert. denied, 449 U.S. 867 (1980) (alleged violation of Article III(a) 180-day time provision and other alleged IADA violations not cognizable under § 2254 as they did not constitute fundamental defects); Huff v. United States, 599 F.2d 860 (8th Cir.), cert. denied, 444 U.S. 952 (1979) (alleged violation of Article IV(e) trial-before return provision not cognizable under § 2255 absent a showing of prejudice); Edwards v. United States, 564 F.2d 652 (2d Cir. 1977) (alleged violation of Article IV(e) trial-before-return provision not cognizable under § 2255 as there was no fundamental defect).

constitute a fundamental defect entitling Kerr to relief under § 2254, because Kerr has failed to show any prejudice arising out of the alleged violation. Nor does this case "'present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" Davis, 417 U.S. at 346.

The IADA was designed, in part, to protect prisoners against whom detainers are issued from being denied prison privileges and rehabilitation efforts. See United States v. Mauro, 436 U.S. 340 (1978). As Kerr has introduced no evidence indicating that he has suffered any prejudice in his incarceration or in defending against the charges against him, we hold that, under Davis, the alleged violation of Article III(a) of the IADA is not cognizable under 28 U.S.C. § 2254.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

7/24

RECEIVED
HAND DELIVERED
MAY 13 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPEARANCE AND NOTIFICATION FORM

SUPREME COURT OF THE UNITED STATES

No. 84 6792

Patrick Wayne Kerr (Petitioner or Appellant) vs. Fred Finkbeiner, Warden (Respondent or Appellee)

The Clerk will enter my appearance as Counsel for Patrick Wayne Kerr

(Please list names of all parties represented)

who IN THIS COURT is X Petitioner(s) ___Respondent(s)

___Amicus Curiae ___Appellant(s) ___Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature: [signature]

Name: Robert C. Whitestone

Firm: WHITESTONE, PHILLIPS, BRENT, YOUNG & MERRIL, P.C.

Address: Suite 200, 10511 Judicial Drive

City & State Fairfax, Virginia Zip 22030

Phone (703) 591-0200

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed he will perform that function. The person to be notified in this case is:

(Type or Print) Name Robert C. Whitestone

Firm WHITESTONE, PHILLIPS, BRENT, YOUNG & MERRIL, P.C.

Address Suite 200, 10511 Judicial Drive

City & State Fairfax, Virginia Zip 22030

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED

ONLY COUNSEL WHO FILE THIS FORM CAN EXPECT TO BE NOTIFIED

RECEIVED
HAND DELIVERED
MAY 13 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-6367

84 6792

Patrick Wayne Kerr,

Appellant,

versus

Fred Finkbeiner, Warden;
Gerald Baliles, Attorney
General of Virginia,

Appellees.

NOTICE OF APPEAL

Notice is hereby given that the Appellant appeals from the judgment of this Court, dated March 18, 1985, signed by the Honorable Hall.

The United States Supreme Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rule 20.

Respectfully submitted,

Robert C. Whitestone
WHITESTONE, PHILLIPS, BRENT,
YOUNG & MERRIL, P.C.
10511 Judicial Drive, Suite 200
Fairfax, Virginia 22030
(703) 591-0200
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of May, 1985, mailed a true copy of the foregoing Notice of Appeal to Fred Finkbeiner, Warden; Gerald Baliles, Attorney General of Virginia, c/o Todd E. LaPage, Assistant Attorney General, 108 North 8th Street, Richmond, Virginia 23219.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DISTRIBUTED
AUG 19 1985
S.L. 4 p.11

ORIGINAL

Supreme Court, U.S.
FILED
AUG 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 84-6792

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

PATRICK WAYNE KERR,

Petitioner,

v.

FRED FINKBEINER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

WILLIAM G. BROADDUS
Attorney General of
the State of Virginia

TODD E. LePAGE
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6565

QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN RULING THAT A COGNIZABLE CLAIM UNDER 28 U.S.C. § 2254 WAS NOT STATED BY A BARE ALLEGATION THAT THE TERMS OF ARTICLE III(a) OF THE INTERSTATE AGREEMENT ON DETAINERS ACT HAD BEEN VIOLATED?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

PRELIMINARY STATEMENT.....1

OPINION BELOW.....1

JURISDICTION.....1

STATEMENT OF THE CASE.....2

ARGUMENT AGAINST GRANTING OF CERTIORARI.....3

THE LOWER COURTS DID NOT ERR IN RULING THAT A COGNIZABLE CLAIM UNDER 28 U.S.C. § 2254 WAS NOT STATED BY A BARE ALLEGATION THAT THE TERMS OF ARTICLE III(a) OF THE INTERSTATE AGREEMENT ON DETAINERS ACT HAD BEEN VIOLATED.

CONCLUSION.....6

CERTIFICATE OF SERVICE.....7

TABLE OF AUTHORITIES

Cases

Barker v. Wingo, 407 U.S. 514 (1972).....5

Davis v. United States, 417 U.S. 333 (1974).....4

Engle v. Isaac, 456 U.S. 107 (1982).....5

Kerr v. Finkbeiner, 757 F.2d at 606 (4th Cir. 1985).....4

Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).....5

OTHER AUTHORITIES

28 U.S.C. § 1254(1).....1

28 U.S.C. § 2254.....3,5

Section 53.1-210 of the Code of Virginia.....2

Rule 20, Rules of the Supreme Court of the United States.....1

NO. 84-6792

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

PATRICK WAYNE KERR,

Petitioner,

v.

FRED FINKBEINER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondents (hereinafter "respondent") respectfully pray that a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 18, 1985, not be granted.

For purposes of uniformity, the parties will be referred to as the petitioner and the respondent, and page number references will be to the Appendix attached to the Petition for a Writ of Certiorari filed by the petitioner and will be designated (App. ___).

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 757 F.2d 604 (4th Cir. 1985).

JURISDICTION

The petitioner asserts that jurisdiction "is invoked under 28 U.S.C. § 1254(1) and Rule 20."

STATEMENT OF THE CASE

While incarcerated in North Carolina, petitioner was served with fugitive warrants from Spotsylvania County, Virginia, alleging certain felonies in that county. On or about May 17, 1979, petitioner filed with North Carolina authorities a "Motion for Request for a Speedy Trial Upon Pending Charge or For Dismissal of Detainer." On May 23, 1979, the Clerk of the Circuit Court of Spotsylvania County acknowledged receipt of petitioner's Motion and advised him that his request was docketed for July 16, 1979.

Petitioner was returned to Virginia from North Carolina on or about September 25, 1979. On October 11, 1979, petitioner's counsel wrote to the Judge of the Spotsylvania General District Court and requested that petitioner's preliminary hearing be continued from November 7, 1979 until at least November 28, 1979. Thereafter, on November 28, 1979, petitioner waived any preliminary hearing and consented that the proceedings could "be by direct indictment to the Spotsylvania Grand Jury at its next Term." On January 21, 1980, at the next term of the Spotsylvania Grand Jury, petitioner was indicted and his case was set for trial on May 22, 1980. On May 19, 1980, petitioner moved to dismiss the indictments against him because he had not been tried in accordance with the one hundred eighty-day time limit prescribed by Article III(a) of the Interstate Agreement on Detainers Act (§ 53.1-210 of the Code of Virginia). Petitioner's motion to dismiss the indictments was denied, and on May 22, 1980, petitioner was convicted by the Circuit Court of Spotsylvania County of robbery, breaking and entering, use of a firearm in the commission of a felony and petit larceny. Petitioner was sentenced to serve a total of twenty-nine (29) years in the Virginia State Penitentiary, sixteen (16) years of which were to run concurrently with sentences which already had been imposed upon petitioner.

Following petitioner's convictions, he petitioned the

Supreme Court of Virginia for a writ of error on the ground that he had not been tried in accordance with the time limits specified in the Interstate Agreement on Detainers Act. The Supreme Court of Virginia denied the petition for a writ of error, and petitioner petitioned the United States District Court for the Eastern District of Virginia for a writ of habeas corpus. Respondent moved to dismiss the petition on the grounds that petitioner had not stated a cognizable claim under 28 U.S.C. § 2254 and, alternatively, that petitioner through his actions had waived his right to assert that the Interstate Agreement on Detainers Act had been violated. (App. 29.) Finding it unnecessary to consider the alternative ground asserted by respondent, the District Court dismissed the petition on the ground that petitioner had not stated a claim which was cognizable under 28 U.S.C. § 2254. (App. 29-31.) Thereafter, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court that petitioner's allegation did not state a cognizable claim under 28 U.S.C. § 2254. (App. 33-40.)

ARGUMENT AGAINST GRANTING CERTIORARI

THE LOWER COURTS DID NOT ERR IN RULING THAT A COGNIZABLE CLAIM UNDER 28 U.S.C. § 2254 WAS NOT STATED BY A BARE ALLEGATION THAT THE TERMS OF ARTICLE III(a) OF THE INTERSTATE AGREEMENT ON DETAINERS ACT HAD BEEN VIOLATED

Petitioner argues that an alleged violation of Article III(a) of the Interstate Agreement on Detainers Act (hereinafter "IAD"), without any allegation of prejudice resulting therefrom, states a claim which is a fundamental defect inherently resulting in a complete miscarriage of justice and which is cognizable under 28 U.S.C. § 2254. Petitioner asserts that those cases holding that a failure to try an accused within the time limits prescribed by the IAD is not a fundamental defect have so ruled in reliance upon the concept that only a breach of a constitutional guarantee may constitute a fundamental defect

resulting in cognizability under 28 U.S.C. § 2254. Petitioner alleges that concepts of fundamental fairness mandate that habeas corpus review extend beyond those rights directly related to the establishment of guilt or innocence. Finally, petitioner urges that his claim should be cognizable because he has "procedurally clean hands," and it is fundamentally unfair not to require the State to honor its obligations under the IAD when he has fully complied with the requirements of the IAD.

Article I of the IAD recognizes that detainers based on outstanding charges against prisoners can produce uncertainties which obstruct programs of prisoner treatment and rehabilitation, and implies that the IAD's purpose is to alleviate those uncertainties. To that end, Article I of the IAD encourages the expeditious and orderly disposition of detainers based upon charges outstanding against persons already incarcerated in other jurisdictions.

Citing this Court's decision in Davis v. United States, 417 U.S. 333 (1974), the Fourth Circuit held that the appropriate inquiry to determine if habeas relief is warranted is "whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[it]...present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" Kerr v. Finkbeiner, 757 F.2d, at 606. Because the IAD was intended, in part, to protect prisoners against whom detainers are issued from being denied prison privileges and rehabilitation efforts, and because petitioner had not alleged any prejudice in his incarceration or in defending the charges against him from the claimed violation of the IAD, the Fourth Circuit held that petitioner's bare allegation that Article III(a) had been violated was not a fundamental defect entitling him to relief under § 2254 and did not present exceptional circumstances where the need for habeas relief was apparent. Kerr v. Finkbeiner, 757 F.2d, at 607.

Petitioner's argument that his claim should have been

cognizable under § 2254 misapprehends the nature of habeas corpus review, as well as ignores established principles of comity and federalism. As noted previously, federal habeas review is meant to correct fundamental defects inherently resulting in miscarriages of justice. Habeas review is not intended to be an additional appeal of issues decided adversely to habeas petitioners by State courts. Cf. Engle v. Isaac, 456 U.S. 107 (1982).

In Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), this Court clearly indicated that federal habeas corpus is concerned with the fairness of a prisoner's conviction and emphasized that the prisoner was not entitled to habeas relief unless he could establish actual prejudice resulting from the alleged constitutional deprivation. Similarly, in Barker v. Wingo, 407 U.S. 514 (1972), this Court noted the importance of a habeas petitioner establishing prejudice to his defense in establishing a speedy trial violation, a claim which is analogous to a violation of Article III(a) of the IAD.

Petitioner asserted his allegation regarding the violation of the IAD in Virginia state courts. Those courts found that petitioner's claims were without merit and denied petitioner's claims. Respondent submits that principles of comity demand that 28 U.S.C. § 2254 not be used to review those courts' decisions unless the petitioner can establish that the alleged violation of the IAD resulted in actual prejudice to his rights constituting a fundamental defect amounting to an inherent miscarriage of justice. Accordingly, respondent submits that the Fourth Circuit correctly ruled that an alleged violation of Article III(a) of the IAD is not cognizable under 28 U.S.C. § 2254 unless the petitioner has alleged facts showing that he suffered prejudice in his incarceration or in defending the charges against him as a result of the alleged violation of Article III(a).

Respondent also submits that the petitioner is incorrect in his assertion that he has "procedurally clean hands" and that it

is fundamentally unfair for him to have complied with all of the requirements of the IAD without requiring the State to honor its obligations. Respondent moved to dismiss the petition for a writ of habeas corpus in the United States District Court on the ground that petitioner, through his actions, had waived any right to claim that he had not been tried within 180 days of his request. See App. 29-31. Respondent's waiver argument was based on the fact that prior to the expiration of 180 days from petitioner's "request" for a speedy disposition, petitioner waived a preliminary hearing and consented that the proceedings could be by direct indictment by the next term of the Spotsylvania County Grand Jury. It was only after petitioner had been indicted by the next term of the Spotsylvania Grand Jury, which was conducted after the 180-day period had run, that petitioner moved to dismiss the indictment on the ground that there had been noncompliance with Article III(a). Respondent's motion to dismiss on the ground that petitioner had waived his rights under the IAD was not addressed by the District Court, however, because the District Court granted the motion to dismiss on the noncognizability ground and found it unnecessary to address the waiver issue. See App. 29-31. Accordingly, respondent says that petitioner does not have "procedurally clean hands" and that there is no merit to his argument that it was unfair not to require the State to honor its obligations under the IAD when he had fully complied with the requirements of the IAD.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM G. BROADDUS
Attorney General of Virginia

Todd E. LePage

TODD E. LePAGE
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6565

CERTIFICATE OF SERVICE

I certify that I, Todd E. LePage, Assistant Attorney General, am a member of the Bar of this Court, and on the 13th day of August, 1985, I mailed with first class postage prepaid, a copy of the Respondents' Brief in Opposition to Granting of a Writ of Certiorari to Robert C. Whitestone, Esquire, 10511 Judicial Drive, Suite 200, Fairfax, Virginia 22030, counsel for petitioner.

Todd E. LePage
Assistant Attorney General

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

PATRICK WAYNE KERR *v.* FRED FINKBEINER, WARDEN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84–6792. Decided October 21, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In April 1979, fugitive warrants were issued against petitioner Kerr by the Circuit Court of Spotsylvania County, Virginia. At that time, Kerr was incarcerated in North Carolina. On May 21, 1979, Kerr filed a "Motion and Request for a Speedy Trial Upon Pending Charge or for Dismissal of Detainer" in the Spotsylvania County Circuit Court. Receipt of the motion was acknowledged by that court on May 23, 1979. On September 25, 1979, Kerr was transported to Virginia from North Carolina. A preliminary hearing was set for November 7, 1979, but the hearing was rescheduled for November 28, 1979, at the request of Kerr's attorney. On the latter date, Kerr waived his right to a preliminary hearing and consented to the State proceeding by grand jury indictment. The Spotsylvania County grand jury indicted Kerr on January 21, 1980, and his trial was set for May 22, 1980.

May 19, 1980, Kerr moved to dismiss the indictment. He based this motion on Article III(a) of the Interstate Agreement on Detainers (IAD), which provides that a prisoner against whom a detainer has been lodged "shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court . . . written notice of . . . his request for a final disposition to be made of the indictment, information, or complaint. . . ." 18 U. S. C. app. § 2, art. III(a). The IAD further provides that

> in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III . . . hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice. . . .

Id., art. V(c). Kerr's motion was denied, and he was tried and found guilty as charged. His petition to the Supreme Court of Virginia for a writ of error was denied.

Kerr then filed a petition for a writ of habeas corpus in the U. S. District Court for the Eastern District of Virginia. He asserted in that petition that he was entitled to relief because he had not been tried within the time limits prescribed by Article III(a) of the IAD. The District Court dismissed the complaint on the ground that it did not state a claim for relief under 28 U. S. C. § 2254.

The United States Court of Appeals for the Fourth Circuit affirmed the dismissal of Kerr's habeas corpus petition. The Fourth Circuit cited *Davis* v. *United States*, 417 U. S. 333 (1974), as setting forth the inquiry for determining whether habeas relief is warranted: "'whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."'" 757 F. 2d 604, 606 (quoting *Davis*, *supra*, 417 U. S., at 346 (quoting *Hill* v. *United States*, 368 U. S. 424, 428 (1962))). The court then noted that in a similar case concerning Article IV(e) of the IAD (under which a prisoner must be tried before being returned to his original place of incarceration and to which the same Article V sanction applies), a previous panel of the Circuit had held that the IAD violation did not present a cognizable habeas claim under the *Davis* test. See *Bush* v. *Muncy*, 659 F. 2d 402 (CA4 1981). In that case, the court had concluded that "only those statutory rights of a fun-

damental nature closely related to constitutionally secured rights to fair prosecution and adjudication should be subject to vindication by collateral review of criminal convictions." 659 F. 2d, at 409.

The Court of Appeals also noted in this case that the Circuits are divided on the question whether Article III and IV IAD violations present cognizable habeas claims under *Davis*. The Third and Ninth Circuits have held that they do. The Third Circuit, for example, has held that such a violation constitutes a "fundamental defect" because, although it does not go to the question of guilt or innocence, Congress made such a violation an absolute defense to prosecution; this strong congressional policy comprises the type of "exceptional circumstance" that makes habeas relief appropriate. See *United States* v. *Williams*, 615 F. 2d 585, 590 (1980). See also *Cody* v. *Morris*, 623 F. 2d 101 (CA9 1980).

All the other Circuits to have addressed the issue have determined that habeas relief is not appropriate in this context, although it may be if prejudice or special circumstances are shown. See, *e. g.*, *Greathouse* v. *United States*, 655 F. 2d 1032 (CA10 1981), cert. denied 455 U. S. 926 (1982); *Mars* v. *United States*, 615 F. 2d 704 (CA6), cert. denied, 449 U. S. 849 (1980); *Fusano* v. *Hall*, 615 F. 2d 555 (CA1), cert. denied, 449 U. S. 867 (1980); *Huff* v. *United States*, 599 F. 2d 860 (CA8), cert. denied, 444 U. S. 952 (1979); *Edwards* v. *United States*, 564 F. 2d 652 (CA2 1977). The Court of Appeals below followed the latter group of cases and held that since Kerr had introduced no evidence of prejudice, his petition had properly been dismissed.

The conflict among the Circuits on this issue is clear. In some Circuits an IAD violation that constitutes an absolute defense under the Agreement can, without more, serve as the basis for habeas relief. In others, prejudice must be shown. Furthermore, it is obvious that the issue is a recurring one. I would grant the petition to settle this conflict.